

STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



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DANA NESSEL  
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April 22, 2020

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-232, The Capitol  
Washington, DC 20515

The Honorable Mitch McConnell  
Majority Leader  
U.S. Senate  
S-230, The Capitol  
Washington, DC 20510

The Honorable Kevin McCarthy  
Minority Leader  
U.S. House of Representatives  
H-204, The Capitol  
Washington, DC 20515

The Honorable Charles Schumer  
Minority Leader  
U.S. Senate  
S-221, The Capitol  
Washington, DC 20510

**Re: An open letter to the United States Congress**

The purpose of this letter is to request that all members of the United States Congress exercise the extraordinary authority that they possess over interstate commerce and take immediate action to save lives. The coronavirus (COVID-19) pandemic has resulted in a significant disruption in the ordinary market conditions for medical supplies and equipment, resulting in widespread shortages of those necessary resources. Congress should intervene and enact legislation—similar to the Emergency Price Control Act of 1942 enacted during World War II—fixing the prices of medical supplies and equipment that hospitals and emergency treatment centers of this country so desperately need in fighting the war against this “invisible enemy.”

The disruption in the healthcare market is far-reaching—affecting not only hospitals and health care providers, but also federal, state, local, and tribal governments. In recent days, the United States Department of Health and Human Services released a report summarizing the results a National Pulse Survey that it conducted of hospitals from March 23-27, as those hospitals were gearing up to treat COVID-19 patients. The report includes the following troubling information related to personal protective equipment (PPE) and other supplies:

- Hospitals reported that heavier use of PPE than normal was contributing to the shortage and that the lack of a robust supply chain

was delaying or preventing them from restocking PPE needed to protect staff. Hospitals also expressed uncertainty about availability of PPE from federal and state sources and noted sharp increases in prices for PPE from some vendors.<sup>[1]</sup>

- To secure the necessary PPE, equipment, and supplies, hospitals reported turning to new, sometimes un-vetted, and non-traditional sources of supplies and medical equipment. To try to make existing supplies of PPE last, hospitals reported conserving and reusing single use/disposable PPE, including using or exploring ultra-violet (UV) sterilization of masks<sup>[2]</sup> or bypassing some sanitation processes by having staff place surgical masks over N95 masks. Hospitals also reported turning to non-medical-grade PPE, such as construction masks or handmade masks and gowns, which they worried may put staff at risk.<sup>[3]</sup>
- Many hospitals noted that they were competing with other providers for limited supplies, and that government intervention and coordination could help reconcile this problem nationally. For example, hospitals wanted the government to ensure that they have access to test kits and swabs, make tests faster by allowing more entities to conduct and produce tests, and help hospitals obtain PPE supplies and other equipment such as ventilators.<sup>[4]</sup>

Hospitals are not alone in feeling the crunch of competition in the healthcare market. State and local governments—conscious of the need to protect their citizenries—are jostling to obtain what supplies may be needed in the months ahead. But this simultaneous, uncoordinated assault upon the healthcare market is resulting in artificial inflation and a misallocation of resources. The resulting

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<sup>1</sup> (U.S. Department of Health & Human Services, Office of Inspector General, *Hospital Experiences Responding to the COVID-19 Pandemic: Results of a National Pulse Survey March 23–27, 2020* (April 2020), Findings at a Glance: Hospital Challenges, available at <https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf>.)

<sup>2</sup> After the survey was conducted, the U.S. Food and Drug Administration issued multiple Emergency Use Authorizations temporarily allowing for the sterilization of N95 masks at certain approved facilities. (See U.S. Food & Drug Administration, Emergency Use Authorizations, *Personal Protective Equipment EUAs*, available at <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations#covid19ppe> (last visited Apr. 17, 2020).)

<sup>3</sup> (*Id.* at Findings at a Glance: Hospital Strategies.)

<sup>4</sup> (*Id.* at Findings at a Glance: Hospital Requests for Assistance.)

frustrations have been expressed by state and local officials from both political parties:

It is no secret that medical supplies needed to combat . . . [COVID-19] are in critically short supply everywhere. “Every state is vying for the resources,” said Rhode Island Governor, Gina Raimondo. “Frankly, every country. Most countries are vying for the same resources, so it’s a challenge.”<sup>[5]</sup>

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Arkansas Gov. Asa Hutchinson (R) said recently that he would like “to see a better way” for States to procure medical equipment as governors continue to bid against each other for necessary supplies amid the coronavirus pandemic.

“We have had circumstances that we’re trying to collect our [personal protective equipment], our protective masks and we’ve been outbid by another State after we had the order confirmed, so yes, that has been challenging for us,” Hutchinson said on NBC’s “Meet the Press.”

“And it literally is a global jungle that we’re competing in now,” he added.

NBC host Chuck Todd asked Hutchinson if he thinks “that’s the way it should be,” with States forced to compete with each other during a crisis.

“I’d like to see a better way, but that’s the reality in which we are,” Hutchinson responded, adding that his State has put \$75 million into procurement.<sup>[6]</sup>

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<sup>5</sup> (Clary Estes, *States Are Being Forced Into Bidding Wars To Get Medical Equipment To Combat Coronavirus*, Forbes (Mar. 28, 2020, 6:00 AM), <https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus/#5b42414f1cde>.)

<sup>6</sup> (Rebecca Klar, *Arkansas governor: ‘I’d like to see a better way’ to procure medical equipment*, The Hill (Apr. 4, 2020, 11:12 AM), <https://thehill.com/homenews/state-watch/491227-arkansas-governor-id-like-to-see-a-better-way-to-procure-medical>.)

Gov. Gretchen Whitmer (D-Mich.) said recently that bidding between States for . . . [PPE] is creating problems as hospitals across the country are seeing depleted supplies amid the coronavirus pandemic.

Whitmer said that in some cases, contracts in place have been set aside, delayed or cancelled and the goods are instead going to the federal government.

“It’s a source of frustration not unique to Michigan, but it’s a unique situation that we have in our country right now and it’s ... creating a lot more problems for all of us,” Whitmer said on CNN’s “State of the Union.”<sup>[7]</sup>

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The effects of this situation have found States in bidding wars amongst each other and the federal government to get critical medical supplies. New York Governor, Andrew Cuomo, has been an outspoken critic of the situation saying, “This is not the way to do it, this is ad hoc, I’m competing with other states, I’m bidding up other states on the prices.”<sup>[8]</sup>

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Similarly, Kentucky Governor, Andy Beshear, admitted that his State lost out to the Federal Emergency Management Agency when bidding to get protective equipment saying, “It is a challenge. The federal government says ‘states, you need to go find your supply chain’ and then the federal government ends up buying from that supply chain.”

Detroit Mayor, Mike Duggan, has also been frustrated with the bidding wars saying, “I shouldn’t be trying to out-negotiate the Mayor of Chicago or the Mayor of Houston. There needs to be a federal response.”<sup>[9]</sup>

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<sup>7</sup> (Rebecca Klar, *Michigan governor says States bidding against each other for medical supplies is ‘creating a lot more problems for us all,’* The Hill (Mar. 29, 2020, 10:49 AM), <https://thehill.com/policy/healthcare/490049-whitmer-says-states-bidding-against-each-other-creating-a-lot-more-problems>.)

<sup>8</sup> (Estes, *supra* note 5.)

<sup>9</sup> (*Id.*)

Recently, Congress enacted a stimulus package designed to help Americans cope with the effects of the business closures inherently necessary to accomplish the social distancing required to slow the spread of COVID-19. While this is a step forward, much more needs to be done, and that effort must include a focus on what is happening in the supply chain for the healthcare industry. Something must be done to prevent those in possession of such supplies from profiteering by simply playing governmental agencies and hospitals off each other in bidding wars that ultimately hurt our national interests. In the end, such bidding wars result in de facto government subsidies to the corporate supplier, funded by the taxpayers of the winning bidder. Congress has the authority to fix prices within the healthcare market to reign in this cycle of competitive bidding. This authority has been long recognized by the United States Supreme Court:

Price control is one of the means available to the states . . . and to the Congress . . . in their respective domains . . . for the protection and promotion of the welfare of the economy. [*Sunshine Anthracite Coal Co. v. Atkins*, 310 U.S. 381, 395 (1940) (citing *Nebbia v. New York*, 291 U.S. 502 (1934); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533 (1939); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).]

States have long exercised their price control authority in the arena of public utilities, like electricity and natural gas. But the States' authority to enact price control measures in the context of this global public health crisis is not an effective tool to meet the problem at hand. If a State enacted and attempted to enforce price control measures against a national supplier, that supplier would simply not do business with that State. Federal coordination is needed, and it is needed now. The public utility of N-95 face masks, gloves, and ventilators has rapidly become a part of our national consciousness.

In presenting this request, it is not lost on us that terms like "price control" can raise the specter of political disagreement. Nor do we presume to tell you how price controls on medical supplies and equipment should be designed or implemented. Our goal is simply to emphasize that there is both a great need, and constitutional authority, for congressional action. So, we implore you to look past the terminology, and turn an eye toward history.

President Trump has analogized our confrontation with COVID-19 to a war through his use of the Defense Production Act. The Act has allowed the production of ventilators by auto manufacturers, and the authorization for the U.S. Attorneys to target price gouging and hoarding behavior. It also allows for wage and price controls with the prior authorization from Congress by a joint resolution under 50 U.S.C. § 4514(a).

On a recent edition of “Meet the Press,” the Surgeon General of the United States described our battle with Coronavirus as this generation’s “Pearl Harbor moment.”<sup>10</sup> This is an apt analogy.

At the onset of World War II, the United States Congress adopted the Emergency Price Control Act of 1942 as an emergency wartime measure. Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23; *Yakus v. United States*, 321 U.S. 414, 422–23 (1944). In an opinion from 1944, the United States Supreme Court explained this Act as follows:

The Act was adopted January 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act, that there was grave danger of wartime inflation and the disorganization of our economy from excessive *price* rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity *price* disparities, accentuated by commodity shortages occasioned by the war.

Inflation is accelerated and its consequences aggravated by *price* disparities not based on geographic or other relevant differentials. . . . [*Yakus*, 321 U.S. at 431–31 (emphasis added).]

When our country went to war nearly eighty years ago, sweeping price control measures were put into place for the express purpose of protecting Americans from the consequences of artificial inflation, gouging, scarcity, and hoarding. *See id.* at 420–23.

Now, we are in a different kind of war, but one that carries with it comparable problems in the market for medical equipment and supplies. As front-line healthcare workers, patients, and taxpayers, Americans throughout the country are paying the price for what is happening with their dollars and their lives. Congress must exercise its authority to calm this market by temporarily regulating the supply chain for the materials needed to meet the public health threat posed by COVID-19.

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<sup>10</sup> (Rick Rojas & Vanessa Swales, *Amid Warnings of a Coronavirus ‘Pearl Harbor,’ Governors Walk a Fine Line*, *The New York Times* (Apr. 5, 2020), <https://www.nytimes.com/2020/04/05/us/coronavirus-aid-governors-pearl-harbor.html>.)

Your attention and consideration of this letter is greatly appreciated by the undersigned. Your response is awaited by everyone.

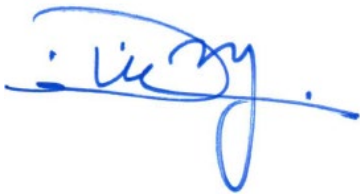
Sincerely,



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